## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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*May It Please the Court*:

The decision of the Appellate Court in this case conflicts with the great weight of authority in a question of Bankrupt Law.

The Appellate Court in its opinion (R. 154) has held that the claim would be released if the bankrupt were discharged. That question was litigated and relitigated a number of times in the Federal Court as shown by the opinion of Judge Wilkerson.

After reading the memorandum of Judge Wilkerson, the petitioner failed to find any docket entry, nor order about his claim being adjudicated a number of times, nor relitigated. But did find in said memorandum, that Strobl filed a petition to vacate the order of discharge, and that the same was denied.

The petitioner sought to revoke the order of discharge on the ground that he scheduled the petitioner's letters patent of the United States No. 465,492, as his own property, and by a stipulation admitted his failure to schedule his interest in his business.

That the District Court of the United States exceeded its jurisdiction in discharging this respondent, because his bankruptcy record discloses these amazing violations of the Bankruptcy Act:

*In re Stoll* v. *Gottlieb,* 305 U. S. 165.

1. Failed to list any *bona fide* creditors other Samuel Strobl.

2. He failed to turn over any assets to the trustee.

3. There was no meeting of creditors.

4. Failed to comply with lawful order of Referee Wean to produce all his books from which his true financial condition might be ascertained, by definitely saying: "Not without a Court order."

5. Upon being asked:

> "Do I understand you to say, that you will not produce before the Referee here, voluntarily, the original certificate of incorporation of the City Wire Frame Co., a corporation?"

John Zidek, Jr. replied:

> "No, I wouldn't.
> Q. You will not?
> A. No."

John Zidek, Jr., then denied that he had any interest at any time in the co-partnership business, the City Wire Frame Co., and the Referee then made the following caustic remark (p. 14): "How are you going to tell from this which time he is lying under oath?"

In respondent's bankruptcy record the following appears (Tr. No. 2, p. 62).

> "It is stipulated and agreed by and between counsel for the objecting creditor (the petitioner here) and counsel for the bankrupt (but not the present counsel) that the schedules of the bankrupt's assets filed in this proceeding, do not show any interest of the bankrupt in a business known as the City Wire Frame Co., unincorporated, or in any co-partnership business of that name; and shows with respect to a corporation called the City Wire Frame Co., incorporated, that the bankrupt has, and has scheduled ten shares

of the capital stock of that corporation, at no par value, and which he values in the schedules at fifty dollars; and that the bankrupt has not scheduled in his list of debtors, F. F. Hodges, or any person of that or similar or like name as one of his debtors."

The photostatic copy of the Articles of Incorporation shows that the respondent turned over the partnership assets of $33,000.00 to the corporation of the same name, *without receiving anything from the corporation for his transfer.* He testified that he bought his share in the corporation. No cash transaction. He worked for the corporation for a week.

Transfer without consideration is void.

Counsel for the petitioner then asked the respondent.

"Is that the time you worked for the corporation when you were on your vacation?
A. No, some other time.
Q. How much do you earn a week?
A. Fifty dollars."

Respondent testified that F. F. Hodges owed him $6,000.00, and by stipulation admitted in open court his failure to schedule him as his debtor.

The above clearly shows that the respondent's bankruptcy proceeding was grotesque and farcical, and it was a bankruptcy in name only, but not in substance, and it was in line with his determination to ruin the petitioner in depriving him of his business and of letters patent of the United States.

The forces of ruination must have been strong that induced the otherwise able and learned counsel for the petitioner to prepare the trial court decree not in conformity with the findings of the Special Master.

At the final hearing before Judge Charles A. Williams, who revived the money decree with interest and costs, the following occurred:

"Counsel for respondent: We appeal, your Honor.
The Judge: Then you must put up a bond.
Counsel for petitioner: I don't want no bond.
The Judge: And you agree to that?
Counsel for petitioner: I don't want no bond.
The Judge: I will make him put up a bond of $250.00 for costs."

Later, petitioner's counsel made a motion to the Appellate Court to increase the bond, which was denied.

This case presents the familiar example of the inventor, and the financially strong exploiter, who, under the guise of a contract, designs to rob the inventor of the fruits of his genius.

At the last hearing before Judge Wilkerson the following occurred: Counsel for petitioner made a motion asking the Court to review the whole record. Counsel for respondent (but not the present counsel) objected. Counsel for petitioner stood there without saying a word. In desperation, petitioner whispered to his counsel:

"Show the Judge the stipulation.
Judge Wilkerson: Let me see it."

After the reading, the Judge addressed himself to counsel for respondent, saying:

"This Court does not want to hear from you any more.
Counsel: What shall I do, your Honor?
The Court: You don't do nothing until you hear from this Court."

Then Judge Wilkerson asked the petitioner:

> "How many lawyers did you have in this case?
> A. Eighteen, your Honor.
> Counsel for respondent: He had twenty lawyers."

Petitioner had to correct himself by saying: "I had twenty lawyers, your Honor."

Here is an important revelation: Counsel for respondent knew better than the petitioner. He apparently paid off that many; and this constituted the review of the whole record.

The memorandum written by Judge Wilkerson failed to cite the above mentioned stipulation, and in spite of it held (R. 152): "The order of Judge Carpenter was correct."

The Special Master in his report (R. 90), had this to say:

> "Throughout the testimony of Strobl has been clear and convincing. He has aparently told the truth even when it seemed to his disadvantage. The testimony of the two lawyers (Paulus F. B. Koenig and John P. Barnes) was not as satisfactory. Apparently they did not have a present recollection of very much that occurred, but testified as best as they could from past recollection.
>
> The defendant (respondent here) Zidek was not at all times as frank and open as Strobl."

Here is the Master's masterly exposition of the character of the two litigants before this Court. On the one hand, the petitioner always told the truth even when it seemed to his detriment, on the other, the respondent always gave evasive answers. Two hundred eighteen times he testified: " don't know, I don't remember," and Referee Wean called him a liar.

Petitioner feels aggrieved that, being honest and free from any wrongdoings, he should be singled out to be deprived of his business, of his letters patent of the United States and on top of this of his money decree upwards of $24,000.00.

We merely desire here to call attention briefly to some of the decisions cited in the petition.

I.

**As to the right of the petitioner to have opposed the respondent's discharge in bankruptcy without thereby being precluded from claiming that his claim was exempted from discharge.**

In the case of *In re Feuer* (C. C. A. 2), 4 Fed. (2d) 892, cited in the petition, the Court considered the point involved in the instant case, and decided (Opinion, p. 893) that *any creditor is a party in interest;* that a creditor whose debt is not dischargeable, although he has nothing to fear from a discharge, provided he can make good the exclusion of his debt under *Section* 17 *of the Act,* may have an interest to avoid that issue, if he can, and *ab initio* deprive the bankrupt of his plea in bar to any subsequent action; *and that any other rule would be quite contrary to the natural purpose of the Act.* The Court concludes its opinion with the following statement (Opinion, p. 893):

> *"In short, there is no good reason for saying that he may not have two strings to his bow."*

## II.

**The question of the dischargeability of plaintiff's claim was not raised, litigated or decided in the bankruptcy proceeding and nothing decided there is res judicata of his claim that it was not dischargeable.**

In *Vallely* v. *Northern Fire & M. Ins. Co.*, 254 U. S. 348, 354, it was held (Opinion, p. 354) that where there is no contested issue and order, no decision in the case can be held as *res judicata* on such an issue not raised, contested or decided. That is the case here. No issue was raised and no order was made in the bankruptcy proceedings on the question of the petitioner's claim being exempted from discharge under Section 17 of the Bankruptcy Act. The decision of the Appellate Court of Illinois (R. 150) that the question of the petitioner's claim being exempt was passed upon in the bankruptcy proceeding and under the authority of *Stoll* v. *Gottlieb*, 305 U. S. 165, became *res judicata* is untenable. In that case there was such an actually contested issue and an order thereon, whereas in the case here no such issue was raised, contested or adjudicated. The gist of the Court's opinion in that case was addressed to those Courts who are wont to exceed their jurisdiction. The Court in that case held:

> "A court does not have the power, by judicial fiat, to extend its jurisdiction over matters beyond the scope of authority granted to it by its creators."

The learned Judge in that case made a very important statement of the law pertaining to the bankruptcy, by holding that:

> "If No. 77-B were construed to empower the District Court to cancel the guaranty, it would violate the Fifth Amendment."

*A fortiori,* and in passing, may we not say with equal force that, if the District Court had the power to rule to deprive the petitioner of his money decree, and give it to the respondent, that likewise would violate the Fifth Amendment.

It was idle, therefore, for the Appellate Court to hold that the petitioner's statement in his objections to the discharge that his claim would be affected by the discharge amounted to an admission that the claim would be released, if the bankrupt were discharged. Federal cases to the contrary are cited under Point II of the Petition herewith.

## III.

**As to the question whether a creditor, whose claim is dischargeable in bankruptcy, may file his claim, accept what dividends are paid, without waiving his right of exemption.**

In the case of *In re Lewis Frank & Son,* 238 Fed. (C. C. A.), the Court held (p. 774), that the creditor might proceed with his suit in the State Court *in tort,* notwithstanding that he had first proved his claim in bankruptcy on contract. The Court there cited *Friend* v. *Talcott,* 228 U. S. 27, in support of its decision. In the last mentioned case the claimant had filed his claim, had accepted a dividend under a composition and had then brought a suit to recover against the bankrupt after his discharge, on the ground that the claim was exempted from discharge under Section 17. The Court there said that the creditor would not be held to have elected his remedy by filing and proving his claim in the bankruptcy proceeding and accepting the dividend; and that he had not thereby *waived* his right to proceed to collect the balance of the debt due him from the bankrupt, saying (p. 38):

> "It is apparent that the exemptions do not rest upon any theory of the *exclusion* of the creditor from the bankrupt act or of deprivation of right to participate in the distribution, but solely on the ground that, although such rights are enjoyed, an exemption from the effect of the discharge is *superadded.* The text leaves no room for any other view, since the exceptions in terms are accorded to certain classes of debts which are provable under *Section* 63, and therefore debts which are entitled to participate in the distribution, the language being: 'A discharge in bankruptcy shall release a bankrupt from all of his *provable* debts, except such as,' etc."

## IV.

**A breach of contract may give rise to an action in tort, because of a breach of a duty arising out of the contract.**

The fact that a cause of action grows out of a breach of contract does not prevent its being maintained *in tort.* That rule is laid down, after an exhaustive discussion of the subject, in the leading case of *Rich* v. *New York Central and Hudson River Railroad Company,* 87 N. Y. 383, 398. The gist of that decision is that, where the omission to perform a contract is also the omission of a legal duty growing out of contract, an action lies for a breach of such duty; that such an action is (Opinion, p. 398):

> "born of that wider range of legal duty which is due from every man to his fellow, to respect his rights of property and person, and refrain from invading them by force or fraud."

That exactly states the principle applicable to the instant case as found by the Master and decreed by the Court, namely that the respondent *ab initio* set out to ruin the petitioner, and, although some of his acts were legal

in themselves, they were all unlawful and invasion of the petitioner's right of property because of the evil design.

The cases of *Oliver* v. *Perkins*, 92 Mich. 304, 310-316, and *Church* v. *Anti-Kalsomine Company*, 118 Mich. 219, follow the rule laid down in the above case and apply the principle under facts closely parallel to the instant case.

## V.

**The wrongful and fraudulent acts of the respondent whereby he destroyed the petitioner's business, while they grew out of a breach of the contract between them, were nevertheless a breach of the above mentioned legal duty.**

This breach is alleged in support of the separate cause of action set forth in petitioner's bill of complaint in apt language to state a cause of action *in tort*, and the bill prays in apt language for the damages thereby sustained by the petititoner (R. 59). The Master found these allegations to have been proven and the Court adopted the Master's findings in entering the money decree for the damages (R. 9-10, 32).

The Appellate Court for the First District of Illinois in its opinion (R. 150) has entirely ignored these facts and the numerous decisions cited under Point IV of the petition herewith, and has merely contented itself with the *ipse dixit* that the money decree for the damages was awarded merely as damages for a breach of the contract.

## VI.

**While some of the acts of the respondent were lawful in themselves as mere breaches of contract, they were accompanied by unlawful acts and all were directed to the accomplishment of an unlawful design.**

Conduct substantially identical as that in the instant case was held in *Carlson* v. *Carpenter Contractors' Union*, 224 Ill. App. 430 (aff'd. 305 Ill. 331), to give rise to an action for willful and malicious injury to the business of another. It was there held that the true test of liability was the primary or ultimate purpose of the defendant, and that the fact that some of the acts done in the accomplishment of such a wrongful purpose were in themselves lawful would not permit the wrongdoer to escape liability; that such acts, even if in themselves lawful, were unlawful if done for an unlawful purpose.

To the same effect see *Meadowmoor Dairies Inc.* v. *The Milk Wagon Drivers Union of Chicago*, 371 Ill. 377, 382.

The Appellate Court for the First District of Illinois has in its opinion ignored the settled rule of law that in such case all of the acts are unlawful.

## VII.

**The character of the petitioner's claim may be determined by an examination of the entire record.**

We refer the Court to the authorities to that effect cited under Point VII of the petition herewith. The Chancellor in reviving the decree with a malice count based it upon such an examination which, as has been shown, discloses that the money decree was based upon a cause of action which exempted it from discharge under Section 17 of the Bankruptcy Act. The Appellate Court for the First District of Illinois has in its opinion ignored this fact.

## VIII.

**It was not necessary to use the words malicious and willful in stating the separate action in tort against respondent. It is implicit in the allegations and the findings of the Master that the respondent's acts were malicious and willful.**

In *Humphreys, et al.* v. *Heller, et al.*, 283 N. Y. S. 915, the Court held that a judgment rendered against the bankrupt in an action for injuries caused by a vicious dog kept by the defendant in that action, who had knowledge of the ferocious character of the dog, was not dischargeable in his bankruptcy proceeding, because the action came within the meaning of the words malicious and willful injury as used in Section 17 of the Act. The Court said (Opinion, p. 916) that the form of the action was not conclusive; that resort may be had to the entire record to determine the essential character of the act; that the willful and malicious character of the act is implicit in such an action; and that it is immaterial that the complaint does not allege that it was willful and malicious. *A fortiori* that is the case here where the Master found that the respondent *ab initio* set out to ruin petitioner, by boasting of his determination to ruin the petitioner (R. 33).

The Court said *In re Dutkiewicz*, 27 Fed. (2d) 344, that it is sufficient to constitute willful and malicious injury to property done without just cause or excuse.

To the effect is *In re Greene*, 87 Fed. (2d) 951 (C. C. A. 7), where the Court said that the action does not involve actual malice. In announcing the same rule *In re Wegner*, 88 Fed. (2d) 899 (C. C. A. 7), the Court said that the cause of action need not be stated in the language of the exception; that it need only be charged in language which

clearly shows intent on the part of the bankrupt to injure others; and that (p. 953) the verdict of the jury is determinative. So here is the finding of the Master.

Respondent, after disobeying the lawful order of the Referee, and by stipulation, admitted his failure to schedule his assets, and thus violated the most important provision of the Bankruptcy Act, cannot expect a court of justice to aid him in the accomplishment of his fraudulent purpose.

## IN CONCLUSION.

The decision of the Appellate Court for the First District of Illinois is so contrary to the applicable decisions of this Court as to deserve its consideration and this Court should not be deterred from considering that question, because the Appellate Court, without any foundation in the record therefor and in direct opposition to the evidence, the findings of the Master and the original decree of the trial Court, and the decree of revivor with a malice count, has found that the petitioner's said money decree was awarded merely as damages for breach of contract (R. 150).

The Federal question is of such importance that this Court should pass upon it and not leave the decision of the Appellate Court of Illinois to stand unchallenged as a final interpretation of it.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Appellate Court for

the First District of Illinois, and that said judgment of the said Appellate Court may be reversed by this Honorable Court, in order that justice may be done to the petitioner, and that your petitioner may have such other relief in the premises as to this Honorable Court may seem meet and just.

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